No. 21-6081

IN THE

United States Court of Appeals for the Tenth Circuit

VICKI JO LEWIS, individually and as co-personal representative of the ESTATE OF ISAIAH MARK LEWIS, deceased; and TROY LEVET LEWIS, individually and as co-personal representative of the ESTATE OF ISAIAH MARK LEWIS, deceased,

Plaintiffs-Appellees,

v.

POLICE OFFICER DENTON SCHERMAN,

Defendant-Appellant.

On Appeal from the U.S. District Court for the Western District of Oklahoma
No. 1:19-cv-489
Hon. David L. Russell

APPELLEES' BRIEF

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ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF RELATED CASES

Pursuant to 10th Circuit Rule 28.2(c)(3), Appellees state there are no prior or related appeals.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Defendant-Officer Scherman—a trainee assigned to traffic duty and in his third week on the force—shot and killed Isaiah Lewis, a naked and visibly unarmed Black teenager in the throes of a mental health crisis, despite the fact that several properly trained officers, including one trained in responding to mental health crises, were peacefully following Isaiah at the time. At summary judgment, the district court concluded that, viewing the facts in the light most favorable to plaintiffs, a reasonable jury could find that Scherman's use of deadly force against Isaiah violated clearly established Fourth Amendment law. The issues on appeal before this Court are:

I. Whether this Court has jurisdiction to take up the district court's denial of summary judgment to Scherman on qualified immunity grounds where Scherman refuses to accept the facts as the district court found them and instead disguises an attempt to relitigate the facts as a question of law;

II. In the alternative, whether the district court correctly held that: (1) Scherman violated clearly established law when he continued using lethal force against an unarmed and completely naked teenager who "no longer presented a threat of serious physical harm"; and (2) Scherman violated clearly established law by employing lethal force as a first resort against an unarmed and mentally ill suspect.

INTRODUCTION

Isaiah Lewis was 17 years old, completely naked, and obviously unarmed when Officer Denton Scherman shot and hit him with not one, not two, not three, but four separate bullets. The district court denied Officer Scherman qualified immunity for his use of deadly force against Isaiah. On this interlocutory review of that decision, this Court must conduct its qualified immunity analysis based on the facts as the district court concluded a reasonable jury could find.

Among those facts is that Scherman's first shot stopped Isaiah in his tracks, such that Isaiah "no longer presented a threat of serious physical harm." AA505. Accepting that fact as true, it was clearly established under this Circuit's precedent that Scherman could not continue shooting Isaiah. A long line of this Court's cases makes clear that an officer cannot continue to use deadly force once a threat has passed, even where the threat—being run over by a vehicle or shot, for instance—is far greater than the one posed by Isaiah.[1]

And a jury could find that the first shot, too, violated clearly established law. AA505, 507. Case after case teaches that officers cannot use lethal force as a first resort against a mentally ill subject who is armed only with a weapon of short-range

[1] *See, e.g.*, *Fancher v. Barrientos*, 723 F.3d 1191, 1196 (10th Cir. 2013); *Est. of Smart by Smart v. City of Wichita*, 951 F.3d 1161, 1166 (10th Cir. 2020); *Reavis v. Frost*, 967 F.3d 978, 982-83 (10th Cir. 2020).

lethality.[2] Shooting Isaiah was even more clearly off-limits: Isaiah not only did not have a weapon capable of inflicting long-range damage; he had no weapon at all.

Defendant's arguments on appeal ultimately boil down to taking issue with the district court's conclusions about what a jury could find. Scherman insists he fired only when Isaiah was close enough to land a punch (though plaintiffs' expert opined that Isaiah's wounds made clear the bullets were fired from further away); that Isaiah knocked a police officer unconscious (though the police officer himself reported that he fell down and hit his head when he tripped over something, not that Isaiah made him fall); and that Isaiah was undeterred by the bullets (though they ripped through his groin, legs, and face). Perhaps defendant will ultimately so prove. But at *this* junction, such arguments are beyond the scope of this Court's jurisdiction. Given the district court's determinations regarding what a reasonable jury could find, Scherman is not entitled to qualified immunity.

[2] *See, e.g.*, *Estate of Ceballos v. Husk*, 919 F.3d 1204 (10th Cir. 2019); *Zia Trust Co. ex rel. Causey v. Montoya*, 597 F.3d 1150, 1153 (10th Cir. 2010); *Carr v. Castle*, 337 F.3d 1221, 1224-25, 1230 (10th Cir. 2003).

STATEMENT OF THE CASE

A. Factual Background[3]

1. Isaiah Lewis, A Black High School Student Experiencing A Mental Health Crisis, Moves Harmlessly Through A Suburban Neighborhood While He Is Naked And Visibly Unarmed.

Isaiah Lewis, a seventeen-year-old student at Boulevard Academy in Edmond, Oklahoma, was described by his classmates as "quiet" and "funny." AA90.[4] Although Isaiah was "adamantly" opposed to "hard drugs," it was rumored at Boulevard Academy that, on April 29, 2019, Isaiah had inadvertently smoked marijuana laced with PCP. *Id*. That same day, Isaiah visited his girlfriend Kamri's home. AA397; AA490.

Kamri immediately noticed that Isaiah was behaving abnormally—he was voicing unusual conspiracy theories—and they began to argue. AA397; AA490. A delivery driver dropping off food for Isaiah and Kamri overheard the disagreement and asked a neighbor to call 911. AA397-98; AA490. The neighbor erroneously reported that Isaiah was "beating up" his girlfriend. AA57; AA183; AA379-80;

[3] The background facts are presented here in the light most favorable to the non-moving party. *Est. of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014). Because defendant impermissibly challenges the district court's factual findings and resolves disputed facts in his favor on this interlocutory appeal, plaintiffs restate the facts here.

[4] Appellant's Appendix is abbreviated "AA." The district court record is abbreviated "ECF."

AA491. Kamri immediately corrected that account, explaining to the 911 operator that Isaiah had been acting bizarrely, but that she and Isaiah "were fine," neither was injured, and no weapons had been involved in the dispute. AA183; AA491; *see also* AA379-80.

Dispatch responded with a "domestic disturbance" alert and four Edmond Police officers, including one trained to respond to mental health crises, answered the call. AA235-37; AA243; AA252-53; AA371-87. On the way to Kamri's house, the officers learned—via police radio and an in-car instant messaging computer system—that Isaiah had taken off all his clothing, except for his socks, and was wandering around the neighborhood. AA237; AA251; AA373. The officers also learned through the police radio and messaging system that Isaiah was unarmed and believed to be either suffering from a mental health crisis, experiencing excited delirium, or under the influence of a mind-altering substance. AA238; AA251; AA374.

For the better part of an hour, Sergeant King, Detective Hunt, and Officer Radcliff, followed Isaiah—naked and visibly unarmed—on foot as he walked and jogged through the suburban neighborhood, its yards, and its surrounding woods. AA87; AA92; AA239, 241-43; AA252-57; AA262-64; AA373-74; AA491. The objective of the officers' pursuit was to "check his welfare," "make sure he's okay and render aid," and obtain mental health care for Isaiah. AA238; AA244. However,

Isaiah hid from them. AA244; AA256; AA264. Police reports reflect that Isaiah was not threatening or menacing civilians or police officers while he travelled harmlessly through the neighborhood. AA398; AA371-87.

On three or four occasions, King, Hunt, or Radcliff located Isaiah and variously called his name, instructed him to "stop," or commanded him to "get down." AA242; AA253; AA264. Sometimes Isaiah did not appear to even notice the officers' presence, AA242; AA256-57; AA262, and other times, he responded bizarrely, alternately answering with unintelligible words, AA87; AA242, and the same expletive—"fuck you" or "fuck off"—before continuing on. AA92; AA253; AA256; AA264-65.

To the officers, Isaiah's unusual behavior confirmed dispatch reports indicating either mental illness or possibly even drug-induced excited delirium. AA244; AA253-55. In fact, according to plaintiffs' expert, it was a "textbook" case of a mental health crisis or excited delirium. AA413. As stated by the officers, because there were "no exigent circumstances" such as "a crime actively taking place"—the domestic incident was over once Isaiah separated from Kamri, and there was no report of even a "minor injury"—officers Hunt, Radcliff, and King merely followed Isaiah without attempting to take him into custody, not even using lights or sirens while in pursuit. AA221; AA257; AA262.

2. As A Training Exercise, Traffic Sergeant Box And Field Trainee Scherman Independently Decide To Pursue Isaiah.

While King, Hunt, and Radcliff were following Isaiah from a safe distance, Sergeant Milo Box, an officer in the traffic division with responsibility for and specialized training in "collision investigation" and "traffic stops," was out on traffic patrol. AA271-272; AA 275-76. Accompanying him was Field Trainee Denton Scherman, a recent graduate of the Edmond Police Academy, who had just completed his second week of on-the-job training. AA299-300; AA409. Box was tasked with teaching Scherman how to "work[] crashes, make[] traffic stops" and investigate collisions. AA271-72. They were on the second day of the four-day training module, during which Box observed Scherman and "evaluat[ed] him on each of his performances." AA272; AA300.

As reports of Isaiah's behavior came through over police radio and instant messaging, Box, as a "teaching moment," instructed Scherman to monitor the situation as it was reported in real-time. AA277; AA279-80; AA302; AA305. They listened and read as it was reported that Isaiah had been involved in a "domestic"—which Box and Scherman knew ran the gamut and could include a non-physical argument. AA279; AA281; AA305; AA374; AA401. They listened and read as it was reported that Kamri was not injured and did not wish to press charges. AA373; AA401. They listened and read as it was reported that Isaiah was unarmed, naked, and wandering around. AA281. They listened and read as it was reported that

officers Hunt, Radcliff, and King were following Isaiah and attempting to make contact. AA280. And they listened and read as officers Hunt, Radcliff, and King reported that Isaiah had walked or jogged off without incident—let alone physical violence or even the threat of violence—each time they attempted to make contact. AA280-281.

Box explained to Scherman that the unexplained removing of clothing could be a sign of mind-altering drug use. AA277. He recounted to Scherman a previous incident where he had attempted to assist other officers in responding to a half-naked man experiencing a mental health crisis. AA277-78. At that time, Box chose to brandish a weapon—his taser—even though the other officers did not and, in fact, those officers successfully subdued the suspect without using weapons. AA277-78.

Scherman and Box continued to monitor Isaiah's case while driving around and "looking for traffic violations." AA277; AA305. Although no one had requested assistance from either Box or Scherman, the pair decided to take Isaiah into custody. AA280; AA409. Box was assigned to the traffic division. AA271-272; AA 275-76. Scherman was only two weeks into his police training and had not completed any police work on his own. AA279-80; AA300. But Box decided that he had a good "learning moment" on his hands and so, even though the responding to the call was outside the scope of Box's assignment and well beyond Scherman's skill level and experience, the pair decided to pursue Isaiah. AA280; AA299-300; AA409.

3. Field Trainee Scherman Kills Isaiah Without Justification.

Before deciding to pursue Isaiah, Scherman and Box failed to communicate with any witnesses or the assigned officers, AA282; AA307, though they did continue to monitor the police radio and instant messaging traffic. AA302. Prior to arriving on the scene, Scherman and Box came across King, Hunt, and Radcliff. AA282; AA306. The pursuing officers were uninjured and had their weapons holstered because they had been tracking Isaiah without incident. AA282-83; AA306-09. Scherman and Box then drove off, leap-frogging King, Hunt, and Radcliff by a block or two. AA308-09.

Seconds later, Scherman and Box spotted Isaiah alone in a yard. AA282; AA308; AA491. Scherman drove toward Isaiah at an angle to cut him off; in hot pursuit, Box hopped out of the car even before it slowed to a stop. AA290; AA308; AA499. Box was certain that Isaiah was unarmed, but rather than attempt to deescalate, as he had been trained to do, AA285, Box immediately pointed his taser at Isaiah while shouting at Isaiah to get on the ground. AA290-91; AA309-10; AA499. Box did so even though "[n]o exigent circumstances . . . necessitated the immediate or forceful apprehension of Isaiah." AA399.

In the throes of a mental health crisis, and perhaps fearing for his life because he mistook the taser for a handgun, Isaiah fled, running to the nearest home to hide. AA310-11; AA398-400. He removed an oval cutout in the front door and went

inside. AA290-91; AA309-10. While Scherman parked the unmarked car, Box chased after Isaiah, removing the cutout "the rest of the way," and running after him into the home. AA291; AA310. Neither Box nor Scherman activated the squad car video and audio recording equipment, and neither turned on a body mic when they pursued Isaiah. AA274; AA295-96; AA304-05.

As Box made his way down the entryway hallway and toward the living room, he observed Isaiah attempting to exit the home through the back door. AA291-92. Rather than letting Isaiah leave the house, Box ordered Isaiah to stop and get on the ground. AA291-92. When Isaiah moved toward Box instead, Box deployed his taser. AA291, AA294; AA491-92. At this point, Scherman was not yet inside the house, though he testified that he heard but did not see the taser deployment. AA63; AA311.

Box and Isaiah then struggled in the living room and Box fired his taser a second time. AA291-92; AA312; AA492. Around this time, Scherman, having since entered the house, walked down the entryway hallway. AA62; AA492. He could see that Isaiah was unclothed and unarmed. AA322.

Box did not see Scherman, but Scherman testified that he saw Isaiah "striking" Box.[5] AA312-13; AA492. At that time, Isaiah's back was to Scherman, but

[5] Photographs taken at the scene show Box with a small cut—approximately .75 centimeters—on the bridge of his nose, and several small scratches elsewhere. ECF 64-5.

Scherman did not attempt to restrain Isaiah or deploy his own taser at that time notwithstanding his "clear tactical advantage" while Isaiah was turned away and struggling with Box. AA313; AA412. Around this time, Box deployed his taser again, this time using drive-stun mode.[6] AA291; AA492.

Box then "hit his head on something as he fell back over something in the house." AA435. When Box fell, he disappeared from Scherman's view. AA87; AA293; AA313; AA400.

Isaiah, still visibly unarmed, "then turned his body toward Scherman and Scherman drew his firearm" without first employing de-escalation techniques, identifying himself as a police officer, or issuing a warning. AA492; AA293-94; AA313-14; AA 322; AA348; AA411. As Isaiah moved in an upright posture in the direction of Scherman, he was waving his arms in a "windmill" pattern. AA314. Scherman then "backed down the entry way hallway toward the front door." AA493. Scherman knew that Isaiah remained unarmed—indeed, Isaiah had not even picked up a household item to use as a weapon. AA322.

[6] "A taser has two functions, dart mode and drive stun mode. In dart mode, a taser shoots probes into a subject and overrides the central nervous system." *Est. of Booker v. Gomez*, 745 F.3d 405, 414 n.10 (10th Cir. 2014) (internal citations and quotations omitted); *see also* AA64 n.2. "In [drive stun] mode, the taser delivers an electric shock to the victim, but it does not cause an override of the victim's central nervous system . . . Drive stun mode is used as a pain compliance tool with limited threat reduction." *Booker*, 745 F.3d at 414 n.10.

Although Isaiah was never close enough to Scherman to attack him, AA368, and Scherman did not issue a warning or deploy less-lethal force as an initial step, Scherman repeatedly fired his service weapon at Isaiah.[7] AA314-16; AA364-65. Using specialized ammunition producing "greater muzzle velocity and stopping power" than standard ammunition, Scherman struck Isaiah four times, including once in the face, and once each in the left thigh, right thigh, and groin. AA364-65; AA367. After the first of the four shots struck Isaiah, Isaiah stopped moving toward Scherman. AA505; AA368. Nonetheless, Scherman kept firing. AA505. At some point during the shooting, Box radioed "shots fired." AA293.

Seconds later, Hunt, Radcliff, and King, who were one or two blocks behind Scherman and Box, arrived. AA317; AA329. When they arrived on scene, Scherman was standing outside the front door, AA92; AA317, his firearm still pointed at Isaiah, who remained inside the house. AA92; AA258. Isaiah, already bleeding to death, AA378, muttered "help me" in the presence of the arriving officers and attempted to crawl toward the front door at the end of entryway hallway, "but was unable to do so due to the amount of blood" on the floor.[8] AA92-93; AA258; AA266-67; AA317-

[7] Both Box and the homeowner explained that they did not hear Scherman issue a warning. AA294; AA348.

[8] The homeowner also heard Isaiah call for help. AA90; AA341; AA348.

18; AA436. Isaiah died from Scherman's gunfire shortly after being transported to the hospital by EMS. AA363.

The County's autopsy report indicates that Scherman was not at "close range" or even at "intermediate range" when he fired any of the four bullets that struck Isaiah. AA367. Had he been close enough to fight with Isaiah—or within range of Isaiah's fists—"stippling" and other hallmarks of close- and intermediate-range firing would have been visible on Isaiah's gunshot wounds.[9] AA368. However, neither the County of Edmond's forensic pathologist nor plaintiff's expert could identify "any of the hallmarks of either a contact wound (soot, searing, muzzle imprint) or of a close or intermediate range wound (stippling) for *any* of 4 gunshot wounds."[10] AA368 (emphasis original); *see also* AA411.

[9] Range of fire—meaning the distance between the muzzle of a gun and its target—is typically divided into the following categories, ordered from near to far: contact range; close or intermediate range; distant range. AA366. A "contact range gunshot wound" refers to "one in which the muzzle of the weapon is touching the surface of the skin." AA366. An "intermediate or close range gunshot wound is one in which the muzzle of the weapon . . . is away from the surface of the skin, but close enough so that uncombusted . . . or partially burned grains of gunpowder strike the skin . . . producing tiny lacerations or abrasions" called "stippling." AA366. Scherman's weapon, which fired specialized high-powered rounds, could create stippling at more than three feet. AA367. Conventional ammunition, by contrast, stops producing stippling at a range of 1.5 to 2 feet. *Id*. Distant range gunshot wounds are those that are inflicted when the "muzzle of the weapon . . . is too far away" to produce "stippling." AA368.

[10] Scherman is the only living witness to the shooting: Box was in the living room when Scherman shot and killed Isaiah, the homeowner was in his bedroom, and the

B. The Proceedings Below

Isaiah's mother and father, plaintiffs in this matter, filed this civil rights action under 42 U.S.C. § 1983. They alleged that Scherman violated Isaiah's Fourth Amendment rights by employing excessive force against him.[11] *See* AA26-39.

The claim proceeded to summary judgment, where Scherman claimed entitlement to qualified immunity. AA52-83. Scherman conceded that Isaiah was visibly unarmed and that he did not issue a verbal warning immediately before firing the first bullet. AA59; AA316; AA322. In all other material respects, Scherman's account was incompatible with plaintiffs' forensic, physical, and circumstantial evidence.

First, while Scherman's story is that Isaiah "knock[ed] Box unconscious" or knocked Box to the ground, Appellant's Br. 22, 23, plaintiffs' evidence is to the contrary. Specifically, moments after Isaiah was killed, Box reported on-scene to Edmond Police "that he thought he hit his head on something as he fell back over something in the house" and might have lost consciousness for a split second. AA293; AA435. Scherman only testified in his deposition that he lost sight of Box

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dispatched Edmond Police officers arrived seconds after the shooting concluded. AA87; AA90; AA226-27; AA257-58; AA265-66; AA340-43; AA436; AA440.

[11] Plaintiffs also sued Box and the City of Edmond. The excessive force claim against Scherman is the only claim at issue on appeal.

after Isaiah turned towards him and did not know whether Box was unconscious. AA315; AA401.

Second, while Scherman's evidence is that he "identified himself as a police officer" and "commanded [Isaiah] to stop and get on the ground" prior to "rais[ing] his firearm," and then again before firing a second bullet at Isaiah, *see* AA65, plaintiffs' evidence is to the contrary. Specifically, neither of the witnesses in a position to hear these commands—the homeowner, who was able to hear Isaiah calling for help, AA348, and Box, who heard the shots and then alerted his colleagues with a message of "shots fired," AA293—reported hearing Scherman identifying himself as a police officer or issuing commands to Isaiah.[12] AA348; AA293.

Third, while Scherman's evidence is that Isaiah "charged" him "like a football player" preparing to make a tackle immediately before Scherman fired at Isaiah, AA492, plaintiffs' evidence is to the contrary. Specifically, one of plaintiffs' experts,

[12] Scherman argues that Box might not have heard Scherman's multiple warnings because Box was allegedly unconscious. AA423. That makes no sense. Box testified that he lost consciousness—if at all—for a split second. AA293 ("At some point, I felt that I lost consciousness and went to the ground for ever how brief of a second.") And in fact, that story becomes harder to believe given that Box had the presence of mind to call out "shots are being fired" over the radio as Scherman was shooting. AA293. A jury could reasonably infer from these facts that Box never lost consciousness, and that he did not hear Scherman make any attempts to give Isaiah commands or de-escalate the situation, because Scherman never made those attempts.

James A. Filkins, M.D., J.D. a pathology and forensic pathology specialist with thirty-one years of experience, explained that "the location and trajectories" of all four of the gunshot wounds "are inconsistent with [Isaiah] being in a charging, tackling position as described by Officer Scherman."[13] ECF 82-8 at 10-11; *see also* AA369.[14] Filkins reached this conclusion to a reasonable degree of medical and scientific certainty, and only after reviewing all pertinent evidence, including the autopsy report prepared by Dr. Lisa M. Barton, a pathologist with the Office of the Chief Medical Examiner, Oklahoma City. AA362-63; ECF 82-8 at 11; *see also* AA369.

Fourth, while Scherman's evidence is that he "discharged his firearm" while Isaiah was "one or two feet" away, or even closer, AA317, plaintiffs' evidence is to the contrary. Specifically, as Dr. Filkins explained, "[n]either Dr. Barton's autopsy report nor a review of the autopsy photographs indicates any of the hallmarks of either a contact wound (soot, searing, muzzle imprint) or of a close or intermediate range wound (stippling) for *any* of 4 gunshot wounds." AA368 (emphasis original). With standard-issue ammunition, stippling would be produced if the muzzle were

[13] According to Dr. Filkins, the downward trajectory of the bullet that went through the right side of Isaiah's face was also inconsistent with Scherman's testimony regarding the position of his hands as he fired his weapon and the two being in close fighting range. AA368.

[14] The text of what should be AA369 was omitted from Appellant's Appendix, so the district court docket is cited where relevant.

within 1.5 to 2 feet of the bullet wound. AA367. Scherman's weapon, however, which fired specialized high-powered rounds, would create stippling at a distance greater than three feet. AA367. Thus, Isaiah must have been more than three feet away from Scherman—and possibly much further than that—when Scherman fired. AA367. Another of plaintiffs' experts, Professor Gregory Gilbertson, a Professor of Criminal Justice, noted "serious questions regarding the accuracy of Officer Scherman's interview and deposition testimony" concerning Scherman's claims about Isaiah's proximity. AA411.

Fifth, while Scherman's story is that Isaiah, even after being shot at, managed to "punch" him "once in the face" and "did not stop attacking [him] until the fifth shot was fired," plaintiffs' evidence is to the contrary. AA.65. Specifically, as Dr. Filkins explained, Dr. Barton's autopsy report establishes that Isaiah "was not within striking distance when Scherman fired and shot [him]." AA368. Had Isaiah been "close enough to Officer Scherman to strike him in the face," there "would have been evidence of a contact or close range wound." AA368; ECF 82-8; *see also* AA369. Further, Scherman's medical providers did not observe any injuries. AA319-20. As Professor Gilbertson explains, that same evidence is incompatible with Scherman's assertion that he was in danger at that time. AA413.

Explaining that genuine disputes of material fact stood in the way, the district court denied Scherman's summary judgment motion. AA508. After weighing the

Graham factors, the district court reached the following factual conclusions: (1) a reasonable jury could determine that the first shot was unjustified; (2) a reasonable jury could determine that the subsequent shots were unjustified. AA505. After analyzing the second prong of the qualified immunity analysis—whether the alleged Fourth Amendment violation was clearly established—the district court concluded that Scherman was not entitled to qualified immunity because this Court had clearly established the relevant law prior to Isaiah's death. AA506-08.

Following the district court's denial of qualified immunity, Scherman filed an interlocutory appeal to this Court. AA522-24.

SUMMARY OF ARGUMENT

When presented with an interlocutory appeal of a denial of summary judgment based on qualified immunity such as this one, this Court lacks jurisdiction to consider anything beyond purely legal questions—that is, this Court's review is limited to considering "(1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation, or (2) whether that law was clearly established at the time of the alleged violation." *Henderson v. Glanz*, 813 F.3d 938, 948 (10th Cir. 2015). Where, as here, a defendant seeks this Court's review of the district court's construction of the facts—even under the guise of asking this Court to reexamine whether they violated clearly established law—this Court has routinely denied such requests for being outside the scope of its limited jurisdiction

in this procedural posture. *See, e.g.*, *Fancher v. Barrientos*, 723 F.3d 1191, 1196 (10th Cir. 2013). Because defendant refuses to accept the district court's factual conclusions in several critical respects, this Court lacks jurisdiction to review his nominally legal argument, and should dismiss his appeal for lack of jurisdiction. *See, e.g.*, *Farhat v. Bruner*, 384 F. App'x 783, 786-87 (10th Cir. 2010).

In the event this Court elects to exercise its jurisdiction over defendant's unsuitably fact-bound appeal, it should affirm the district court's denial of summary judgment to Scherman, as it was clearly established at the time Scherman shot and killed Isaiah, who was undisputedly naked and unarmed, both that it is objectively unreasonable to employ deadly force as a first resort against an unarmed individual obviously enduring a mental health crisis, and also that an officer's use of deadly force is objectively unreasonable when the threat to the officer has clearly passed.

As the district court found, defendant is not entitled to qualified immunity for his use of deadly force against Isaiah because "a reasonable jury could conclude that no reasonable officer could have believed that the use of lethal force was lawful when Scherman encountered [Isaiah] at 520 Gray Fox Run." AA507. And, at the very least, a reasonable jury could also conclude that "after Scherman discharged his firearm once, [Isaiah] no longer presented a 'threat of serious physical harm,'" eliminating the need for the continued use of deadly force. AA505. Taking these

factual conclusions as true—as is required at this stage—the district court's denial of qualified immunity must be affirmed.

This Court recognized in *Zia Trust Co. ex rel. Causey v. Montoya*, that "[it is] not at liberty to review a district court's factual conclusions, such as the existence of a genuine issue of material fact for a jury to decide, or that a plaintiff's evidence is sufficient to support a particular factual inference." 597 F.3d 1150, 1152 (10th Cir. 2010). Under the "universe of facts" explicitly found by the district court, and with so many genuine material factual disputes identified by the district court, it is clear both that Scherman violated the clearly established law of this Circuit and that this case must proceed to a jury. This Court should therefore dismiss the appeal or affirm the district court's denial of summary judgment to defendant.

STANDARD OF REVIEW

At summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to drawn in his favor." *Tolan v. Cotton*, 572 U.S. 650, 651, 656 (2014). This rule is especially important in the deadly force context where "the witness most likely to contradict [the officer's] story—the person shot dead—is unable to testify." *Est. of Smart by Smart v. City of Wichita*, 951 F.3d 1161, 1170 (10th Cir. 2020) (quoting *Pauly v. White*, 874 F.3d 1197, 1217-18 (10th Cir. 2017)).

On interlocutory appeals such as this one, however, this Court's review is even more circumscribed. *Henderson v. Glanz*, 813 F.3d 938, 948 (10th Cir. 2015). "[W]hen reviewing the denial of a summary judgment motion asserting qualified immunity," this Court "lack[s] jurisdiction to review the district court's conclusions as to what facts the plaintiffs may be able to prove at trial." *Simpson v. Little*, 16 F.4th 1353, 1357 (10th Cir. 2021). That is, "this court has no interlocutory jurisdiction to review 'whether or not the pretrial record sets forth a "genuine" issue of fact for trial.'" *Henderson*, 813 F.3d at 948. Instead, this Court may only review: "(1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation, or (2) whether that law was clearly established at the time of the alleged violation." *Id*. This Court "must scrupulously avoid" exceeding the boundaries of its limited interlocutory jurisdiction. *Fancher v. Barrientos*, 723 F.3d 1191, 1199 (10th Cir. 2013) (quoting *Clanton v. Cooper*, 129 F.3d 1147, 1153 (10th Cir. 1997)).

Accordingly, it is well established on interlocutory review that this Court has jurisdiction only insofar as the defendant's arguments accept as true the district court's assessment that there is sufficient evidence in the record for a reasonable jury to find that certain facts are true. *Johnson v. Jones*, 515 U.S. 304, 316 (1995); *see also, e.g.*, *Duda v. Elder*, 7 F.4th 899, 909-10 (10th Cir. 2021). Defendants who observe that rule are free to avail themselves of this court's limited interlocutory

jurisdiction for purposes of arguing that the facts, as set forth by the district court and in the light most favorable to the non-movant, do not constitute a violation of clearly established law. *Duda*, 7 F.4th at 910.

But where defendants instead ask this Court to second-guess the district court's determinations that a plaintiff has presented sufficient evidence to prevail at summary judgment, "this court lacks jurisdiction to review [the] appeal at the interlocutory stage" and must "dismiss[] for lack of appellate jurisdiction." *Castillo v. Day*, 790 F.3d 1013, 1018 (10th Cir. 2015); *see also, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (Scalia, J.) ("Without jurisdiction" the court is left only to "announc[e] the fact and dismiss[] the cause."). This rule holds just as true where the appellant "attempts to characterize" the "challenge to the district court's conclusion Plaintiffs presented sufficient evidence to survive summary judgment" as a purely legal challenge. *Castillo*, 790 F.3d at 1018. Appellate courts simply have no jurisdiction to resolve fact-related disputes about the record on interlocutory review, even when they are disguised as arguments that defendants did not violate "clearly established law." *Duda*, 7 F. 4th at 909; *see also, e.g.*, *Lynch v. Barrett*, 703 F.3d 1153, 1160 (10th Cir. 2013) (same); *Fancher*, 723 F.3d at 1200 (same).

ARGUMENT

I. This Court Should Dismiss The Entire Appeal On Jurisdictional Grounds.

From the Statement of the Issue Presented for Review to the final paragraphs of the brief, Scherman's argument that he violated no clearly established law is dependent upon challenges to the district court's finding of fact. *See* Appellant's Br. 1 (framing issue on appeal by challenging district court's factual conclusions regarding what a reasonable jury could find); Appellant's Br. 12, 15-17 (distinguishing *Allen v. Muskogee, Okl.*, 119 F.3d 837 (10th Cir. 1997) and *Ceballos v. Husk*, 919 F.3d 1204 (10th Cir. 2019) by challenging district court's factual conclusions regarding what a reasonable jury could find); Appellant's Br. 18-19 (proposing reliance on Fifth Circuit precedent by challenging district court's factual conclusions regarding what a reasonable jury could find); Appellant's Br. 19-23 (distinguishing *Est. of Smart by Smart v. City of Wichita*, 951 F.3d 1161 (10th Cir. 2020), *Zuchel v. Spinharney*, 890 F.2d 273 (10th Cir. 1989), *King v. Hill*, 615 F. App'x 470 (10th Cir. 2015), *Fancher v. Barrientos*, 723 F.3d 1191 (10th Cir. 2013), *Zia Trust Co. ex rel. Causey v. Montoya*, 597 F.3d 1150 (10th Cir. 2010), and *Reavis v. Frost*, 967 F.3d 978 (10th Cir. 2020) by challenging district court's factual conclusions regarding what a reasonable jury could find).[15]

[15] A fulsome discussion of the facts Scherman disputes on appeal follows in Section II, *infra*.

Yet, time and again, this Court has held that it lacks jurisdiction to consider such challenges. As noted below, the defendant in *Fancher* did much the same, "nominally framing his argument as a legal issue" when it "ultimately depended upon a challenge to the facts the district court concluded a reasonable jury could infer." 723 F.3d at 1200 (cleaned up). Because that argument—though disguised as a legal argument—"amounts to nothing more than a request for review of the factual conclusions of the district court," this Court concluded the argument "exceed[ed] the scope of [its] jurisdiction." *Id*. The defendant in *Duda v. Elder*, 7 F.4th 899, 916 (10th Cir. 2021), attempted a similar tactic, "intertwining" fact disagreements "with principles of law" while nominally arguing that clearly established law was "distinguishable." Again, this Court had no trouble concluding that it "lack[ed] jurisdiction to consider [the officer's] fact-bound challenge to the district court's clearly established argument." *Id*. at 917. As but one final example, in *Simpson v. Little*, the defendant-officer asked this Court "to revisit the district court's factual determinations undergirding both prongs of its qualified immunity analysis." 16 F.4th 1353, 1361 (10th Cir. 2021). In his view, the district court had "failed to recognize undisputed facts establishing the reasonableness of his actions." *Id*.. As for the clearly established prong of the district court's analysis, the officer proffered a similar argument—that the district court had failed to properly consider evidence of "the reasonableness of the Defendant [officer's] conduct based in light of the facts

and circumstances confronting him." *Id*. at 1364. This Court held it lacked jurisdiction to consider these arguments. *Id* at 1365.

When this Court can disentangle impermissible challenges to the district court's factual conclusions from permissible purely legal challenges, it may elect to do so. *See*, *e.g.*, *Duda*, 7 F.4th at 916-17 (exercising jurisdiction over some arguments but not others); *Simpson*, 16 F.4th at 1365-66 (similar). But here, this Court is presented with a different situation.

Unlike in *Duda* and *Simpson*, where defendants raised some jurisdictionally appropriate arguments, Scherman has just one argument—*i.e.*, that he did not violate clearly established law. And in making that case, Scherman presents only "a fact question clothed as a legal argument." *Farhat v. Bruner*, 384 F. App'x 783, 786-87 (10th Cir. 2010). Under such circumstances, this Court's practice is to dismiss the appeal.[16] *See, e.g.*, *id*. at 786-87; *Farhat v. Young*, 343 F. App'x 321, 324 (10th Cir. 2009) (dismissal for lack of jurisdiction necessary where defendant's clearly-

[16] Dismissing on non-jurisdictional grounds, often by unpublished disposition, is common practice under these circumstances in other circuits, too. *See*, *e.g.*, *Cady v. Walsh*, 753 F.3d 348, 359-60 (1st Cir. 2014); *Marrero for Est. of Morales v. Cote*, 756 F. App'x 79, 80 (2d Cir. 2019); *Blaylock v. City of Phila.*, 504 F.3d 405, 412-414 (3d Cir. 2007); *Witt v. W. Virginia State Police, Troop 2*, 633 F.3d 272, 278 (4th Cir. 2011); *Southall v. Arias*, 256 F. App'x 674, 676 (5th Cir. 2007); *Parks v. Warren Corr. Inst.*, 51 F. App'x 137, 141 (6th Cir. 2002); *Via v. LaGrand*, 469 F.3d 618, 625 (7th Cir. 2006); *Thompson v. Murray*, 800 F.3d 979, 984 (8th Cir. 2015); *Tabarez v. Butler*, 340 F. App'x 369, 372 (9th Cir. 2009); *Koch v. Rugg*, 221 F.3d 1283, 1298 (11th Cir. 2000).

established argument "is grounded in disputed facts"). This Court should reject defendant's attempt to flout the deference owed to Judge Russell and, consequently, this Court's jurisdiction. This Court should "announce the fact" that it has no jurisdiction and thereafter "dismiss[] the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

II. Scherman Violated Clearly Established Law.

The district court properly denied qualified immunity to Scherman. In evaluating whether a defendant is entitled to qualified immunity, this Court asks two questions: (1) whether "the officers' alleged conduct violated a constitutional right" and (2) whether "it was clearly established at the time of the violation . . . that such conduct constituted a violation of that right." *Perea v. Baca*, 817 F.3d 1198, 1202 (10th Cir. 2016) (quoting *Mullenix v. Luna*, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015)).

In evaluating whether a defendant violated clearly established law, "'the salient question . . . is whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'" *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (quoting *Hope v. Pelze*r, 536 U.S. 730, 741 (2002)). That "fair warning"—which makes the law "clearly established"—can come from a "Supreme Court of Tenth Circuit decision on point." *Halley v. Huckaby*, 902 F.3d 1136, 1144 (10th Cir. 2018).

But the qualified immunity analysis "is not a scavenger hunt for prior cases with precisely the same facts." *Smart*, 951 F.3d at 1168. Indeed, "'general statements of the law' can clearly establish a right for qualified immunity purposes if they apply 'with obvious clarity to the specific conduct in question.'" *Halley*, 902 F.3d at 1149 (quoting *Hope*, 536 U.S. at 741). And in some cases, the unconstitutionality of a defendant's conduct may be clear despite a total absence of precedent addressing similar circumstances. *McCoy v. Meyers*, 887 F.3d 1034, 1053 (10th Cir. 2018); *see also*, *e.g.*, *Hope*, 536 U.S. at 741; *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020).

In cases where an officer applies force sequentially—deadly or otherwise—this Court may analyze the applications of force separately. *See*, *e.g.*, *Smart*, 951 F.3d at 1169, 1175 (separately reviewing first shot and subsequent shots).

A. The District Court Correctly Denied Qualified Immunity To Scherman For Continuing To Shoot Isaiah After His First Shot Stopped Isaiah.

The district court concluded that a jury could find that after Scherman fired his first shot, Isaiah "no longer presented a threat of serious physical harm." AA505 (internal quotation marks omitted). As defendant himself acknowledges, it has been clearly established for over a decade that "the use of deadly force is unreasonable when a reasonable officer would have perceived that the threat had passed." Appellant's Br. 19-20. Because clearly established law forbade Scherman's second,

third, and fourth shots, this Court, should it conclude that it has jurisdiction over the appeal, must affirm the district court's denial of summary judgment.

1. This Court Must Assume A Jury Could Find Isaiah No Longer Presented A Threat After Scherman's First Shot.

Again, at this junction, on interlocutory review, "[t]he district court's factual findings and reasonable assumptions comprise the universe of facts upon which this Court bases its legal review of whether defendants are entitled to qualified immunity." *Simpson*, 16 F.4th at 1360. The district court here held that a jury could find, first, that the first bullet to hit Isaiah stopped him from continuing to move forward, and, second, that after that first bullet hit Isaiah, he was no longer a threat. AA505. This Court does not have jurisdiction to consider any challenges to those conclusions.

Defendant's brief pays lip service to this principle, but flouts it at every turn. For instance, defendant insists that Isaiah continued to move toward Scherman after Scherman fired his first shot. Appellant's Br. 22-23. But the district court held that a reasonable jury could find otherwise: "Construing the facts in Plaintiffs' favor, after Scherman first shot [Isaiah], [Isaiah] no longer continued to barrel toward him." AA505. And unless that holding was a "visible fiction"—which defendant has not asserted—this Court is bound by it on interlocutory review. *Lynch v. Barrett*, 703 F.3d 1153, 1160 n.2 (10th Cir. 2013).

Defendant similarly urges that this Court should assume Isaiah posed an ongoing threat, even after he was first shot. Appellant's Br. 22-23. But that, too, is contrary to the district court's express finding: "A reasonable jury could conclude that, after Scherman discharged his firearm once, [Isaiah] no longer presented a threat of serious physical harm." In *Fancher*, the district court similarly concluded that a jury could find that the victim "may not have presented a continuing danger to [the officer] or to the public." 723 F.3d at 1200. Defendant similarly argued that "the threat of harm caused by the decedent to [the shooting officer] and to nearby community members existed for the duration" of the incident. *Id.* This Court rejected that assertion, finding that the argument about the duration of the threat "cannot reasonably be understood as anything other than an attack on these conclusions of the district court." *Id.* As such, this Court lacked jurisdiction to consider the argument. So, too, here. Defendant's arguments about whether any threat that Isaiah posed to Scherman "existed for the duration" of the shooting "cannot reasonably be understood" as within the scope of this Court's jurisdiction.

In this procedural posture, defendant must be "willing to concede" the district court's conclusions regarding the most plaintiff-friendly version of the facts. *Farmer v. Perrill*, 288 F.3d 1254, 1258 n.4 (10th Cir. 2002). To the extent his arguments are "nothing more than a request for review of the 'factual conclusions' of the district court," this Court lacks jurisdiction to consider them. *Fancher*, 723 F.3d at 1200.

And Scherman is all but explicitly asking this Court to review the "factual conclusions of the district court." In seeking to distinguish on-point precedent, Scherman describes the "crucial distinction between this case" and prior precedent as Isaiah's "movement toward Officer Scherman after he fired the first shot." Appellant's Br. 22-23. Scherman seeks to re-litigate the district court's factual finding regarding Isaiah's post-shooting conduct under the guise of making a legal argument based on whether the right in question was clearly established. As discussed previously, he is plainly barred from doing so through this interlocutory appeal, no matter how bound up the legal question is in his inaccurate retelling of the facts. *Reavis*, 967 F.3d at 988. Under these circumstances, the proper response is to "dismiss[] for lack of appellate jurisdiction." *Castillo v. Day*, 790 F.3d 1013, 1018 (10th Cir. 2015).

To the extent this Court instead chooses to engage in the cumbersome process of disentangling Scherman's factual challenges from his purely legal arguments and proceed rather than dismiss the appeal, the scope of review is narrow. The *only* argument this Court may entertain on appeal is whether, assuming a jury finds that Scherman's first shot stopped Isaiah in his tracks and that Isaiah "no longer presented a threat of serious physical harm," Scherman is nonetheless entitled to qualified immunity for shooting him three more times.

2. It Was Clearly Established That An Officer Cannot Continue To Use Deadly Force After Any Threat Has Passed.

As defendant concedes, "it is clearly established that the use of deadly force is unreasonable when a reasonable officer would have perceived that the threat had passed." Appellant's Br. 19-20. This Court has applied that rule in a variety of circumstances. To take just four examples:

- In *Fancher v. Barrientos*, the victim grabbed a police officer's duty weapon, which discharged; then stole the officer's patrol vehicle, which contained two loaded long guns; then drove so close to the officer that the car "pressed up against" the officer's shoulder. 723 F.3d 1191, 1196 (10th Cir. 2013). The officer fired seven rounds; at least some of those shots were fired after the victim had slumped over. *Id.* at 1196-97. This Court denied qualified immunity as to shots two through seven, finding that *Tennessee v. Garner*, 471 U.S. 1 (1985), itself—the seminal case limiting deadly force to circumstances where there is a risk of "serious physical harm to the officer or others"—clearly established the law. *Fancher*, 723 F.3d at 1201.
- In *Perea v. Baca*, the victim struggled with police officers attempting to handcuff him, thrashing and lashing out with a crucifix. 817 F.3d 1198, 1201 (10th Cir. 2016). Police officers tased him ten times in two minutes, "continuing after [he] had been effectively subdued." *Id.* At some point during those two minutes, police officers were able to get the victim on the ground on his stomach. *Id.* This Court denied qualified immunity, finding that it was clearly established that the continued use of force against a victim who no longer posed a threat violated the Fourth Amendment. *Id.* at 1204-05.
- In *Est. of Smart by Smart v. City of Wichita*, an officer faced with an active shooter hiding in a crowd of hundreds fired four rounds at the person he thought (mistakenly, as it turned out) was the shooter. 951 F.3d 1161, 1166 (10th Cir. 2020). All four shots were fired within five seconds. *Id.* at 1166. The final three were fired after the victim was already on the ground. *Id.* at 1166-67. This Court held it was clearly established as of 2012, which is when the shooting occurred, that it violated the Fourth Amendment for the officer to keep shooting "after it became clear the victim posed no threat." *Id.* at 1175-77 (collecting cases dating back to 1991).

- Finally, in *Reavis v. Frost*, a police officer approached a truck on foot. 967 F.3d 978, 982-83 (10th Cir. 2020). The driver accelerated his car toward the police officer, missing him by "inches." *Id.* at 984. The officer shot as soon as he "found sight picture" on his gun, but the truck had already passed him, so his shots hit the driver through the side of the truck. *Id.* Relying on *Fancher* and *Smart*, this Court denied qualified immunity because it was clearly established in 2016, when the shooting occurred, that "the use of deadly force is unreasonable when a reasonable officer would have perceived that the threat had passed."[17] *Id.* at 989.

As this Court and the Supreme Court have recognized, clearly established law does not require cases with identical facts. Indeed, each of these cases denied qualified immunity based on cases that arose in varying factual circumstances. *Smart*, for instance, relied on *Perea* to deny qualified immunity, even though the *Perea* victim was a man on a bicycle, not a potential active shooter; *Perea*, in turn, relied on *Fancher*, even though the *Fancher* victim was driving away from the police officer, not tussling with him on the ground; and *Fancher* and *Reavis* relied on *Garner*, even though the victim in *Garner* was a burglar fleeing police on foot, not a driver who'd tried to wrestle a gun away from a police officer or a trucker using his vehicle as a weapon. But each concluded that, despite the factual variety, the underlying rule—no deadly force once a threat has passed—was sufficiently specific to deny qualified immunity. *See also Huff v. Reeves*, 996 F.3d 1082, 1090-91 (10th Cir. 2021) (rule that "officers are prohibited from using deadly force against a person

[17] Although *Smart* and *Reavis* were decided after Isaiah was killed, their evaluation of the clearly established law prior to Isaiah's death is binding on this Court. *See Soza v. Demsich*, 13 F.4th 1094, 1100 n.3 (10th Cir. 2021).

when it is apparent that the person poses no physical threat to the officers or others" is clearly established; rejecting argument that rule is defined at "too high a level of generality").

The rule that an officer cannot use deadly force when the threat has passed applies with full force in this case. The threat posed by a naked, unarmed Isaiah prior to the first shot was certainly no greater than the threat posed by an active shooter in *Smart*, by the truck barreling toward the officer in *Reavis*, or by the assailant making off with a police car full of firearms in *Fancher*. A bullet to the leg, groin, or face that stopped Isaiah from continuing toward Scherman marked an end to the threat just as surely as the bullet fired in *Fancher* or the truck's passing of the police officer in *Reavis*. *See* AA505. And whatever time Scherman had to perceive that Isaiah had been hit was certainly no less than the five seconds in *Smart* or the milliseconds in *Reavis*, cases in which this Court held that a jury could conclude that a reasonable officer would have known the threat had passed. Taking the facts in the light most favorable to plaintiffs, then, it violated clearly established law for Scherman to continue shooting after his first shot stopped Isaiah.

Defendant's only argument in response is that the cases finding force unconstitutional after a threat has passed apply only when the victim is "incapacitated." Appellant's Br. 19-24. As an initial matter, a fair reading of the record at this junction makes clear that even such a rule would govern this case. The

bullets penetrated Isaiah's face, his right thigh, the left side of his groin, and his left thigh. AA366-68. At the very least, a jury could find that any one of those shots would have incapacitated Isaiah. And plaintiffs' expert concluded that the bullet in Isaiah's face was fired while Isaiah was either doubled over, his face roughly level with Scherman's hip, or in a seated position. AA368. Plaintiffs have thus presented enough evidence that Isaiah was incapacitated when one or more of the final shots were fired such that this case must go to a jury, even if this Court's cases required incapacitation.

In any event, the rule described in this Court's cases is not so narrow. In *Reavis*, for instance, this Court concluded that the "threat had passed" because the truck that the victim was driving had driven past the officer. 967 F.3d at 989-90. The victim was, obviously, not incapacitated—he was driving and hadn't been injured, and he could, presumably, quickly swerve or reverse the car to target the officer again. *Id.* at 983. Yet this Court concluded that shooting the victim was clearly unconstitutional because the "threat has passed" cases clearly established the law.

As *Reavis* makes clear, the dispositive question for qualified immunity purposes is whether or not the "threat has passed," not whether or not the victim was "incapacitated." And here, the district court concluded that the threat had, in fact,

passed—a finding defendants cannot challenge on interlocutory review.[18] AA505 ("A reasonable jury could conclude that, after Scherman discharged his firearm once, [Isaiah] no longer presented a threat of serious physical harm."); *see Fancher*, 723 F.3d at 1200.

One final note: As both this Court and the Supreme Court have explained, "officials can still be on notice that their conduct violates clearly established law even in novel factual circumstances." *Hope*, 536 U.S. at 741; *see McCoy*, 887 F.3d

[18] Scherman's proposal of alternative precedent suffers from the same defect. Scherman argues that the district court should have relied on a single Fifth Circuit case, *Colston v. Barnhart*, 130 F.3d 96 (5th Cir. 1997)—rather than Tenth Circuit precedent—to conclude that "the law was not clearly established when Officer Scherman shot [Isaiah]." Appellant's Br. 17-19. To start, this Court does not turn to out-of-circuit precedent where, as here, Tenth Circuit precedent provides appropriate guidance. *See*, *e.g.*, *Ullery v. Bradley*, 949 F.3d 1282, 1294 (10th Cir. 2020) (explaining that this Court examines a "consensus of cases of persuasive authority from other jurisdictions" in the "absence of binding precedent" from the Tenth Circuit or Supreme Court). In addition, in drawing his comparison between the two cases, Scherman again ignores the district court's factual findings in favor of his own version of the facts. Among the supposedly similar facts that Scherman relies on, he states that both Isaiah and Colston knocked other officers to the ground. Appellant's Br. 18. But, as noted above, the district court found no such thing. *Supra*, 14-15. Scherman contrasts Colston's post-shot conduct—Colston "mov[ed] away from the officer" after the first shot, whereas Isaiah purportedly "mov[ed] toward" Scherman after the first shot. Appellant's Br. 18-19. But, as noted above, the district court found that Isaiah ceased moving toward Scherman after the first shot. AA505. The comparison fails for at least one other reason: After the first shot was fired, Colston headed for a patrol car, presumably to grab the officer's "shotgun" and return fire. 130 F.3d at 100. Isaiah, by contrast, had not even sought out a household object to use as a weapon after Scherman shot at him. AA322.

at 1053. In some cases, it would be "obvious" to any reasonable officer that their conduct was constitutionally proscribed. *Hope*, 536 U.S. at 738.

Here, it should be obvious to any reasonable officer that after a shot to the leg, groin, or face had stopped a naked, unarmed 17-year-old boy in his tracks, any further gunfire would be unreasonable, even without the long line of published Tenth Circuit cases saying so. *See Taylor*, 141 S. Ct. at 52. This Court must affirm the district court's denial of qualified immunity on the second, third, and fourth shots fired by Scherman.

B. The District Court Correctly Denied Qualified Immunity To Scherman For The First Shot.

1. This Court Must Assume A Jury Could Find That It Was Unreasonable To Fire The First Shot At Isaiah.

Once again, Scherman refuses to accept the district court's conclusion that a jury could find that his first shot was also unreasonable. After weighing each of the *Graham* factors, the district court found that "a reasonable jury could conclude that though force was clearly necessary, *deadly* force was not justified against the naked, unarmed [Isaiah]." AA505 (emphasis in original). While Scherman also pays lip service to this factual conclusion, he once again attacks it at every turn.

Consider Scherman's argument that the district court's analysis of the reasonableness of his actions under *Graham* was faulty because it purportedly "failed to consider [Isaiah's] actions immediately prior to his encounter with Officer

Scherman." Appellant's Br. 12. As an initial threshold matter, the district court quite obviously did not overlook those facts. *See, e.g.*, AA502-05. As a second threshold matter, defendant's argument turns the summary judgment standard on its head by casting the evidence in the light most favorable to him, the movant. More to the (jurisdictional) point, Scherman's argument on appeal depends upon a view of the facts that is incompatible with the district court's findings. Take the factual assertions in order.

First, Scherman argues on appeal that Isaiah "became aggressive toward officers long before he encountered Sergeant Box and Officer Scherman." Appellant's Br. 16." But that's not what the district court found. The district court instead found that Isaiah was merely "intermittently running naked around the neighborhood and hiding, and generally behaving strangely" before encountering Scherman and Box. AA491.

Second, contrary to Scherman's assertion, the district court characterized the claim that Isaiah "beat another officer unconscious" as a genuine dispute of material fact considering the parties' "diverge[nt] evidence." AA492-93. Consequently, the district court only found that "Box disappeared from Scherman's line of sight." AA492. And no wonder: Scherman never reported that he saw Box beat unconscious, and Box himself stated to Edmond Police, moments after Isaiah was killed and when his own memory was freshest, that he was responsible for any split-

second loss of consciousness, explaining that "he hit his head on something as he fell back over something in the house." AA435. That is, a reasonable jury could find that Isaiah didn't knock Box down or beat him unconscious; Box simply tripped.

Third, contrary to Scherman's assertion on appeal that he "directly observed multiple TASER deployments fail[] to subdue" Isaiah, Appellant's Br. 2, the district court's chronology places Scherman in a position where he *could have* observed, at most, *one* taser deployment—certainly not three. AA491-92. And Scherman's claim in the district court that he "heard" one successful taser deployment, AA65, is both inconsistent with his argument on appeal that he observed multiple taser deployments and contrary to plaintiffs' evidence that Scherman, a trainee, lacked an evidentiary foundation to distinguish aurally between successful and unsuccessful taser deployments. AA187. According to plaintiffs' policing expert—who "completed over 1,000 hours of law enforcement and tactical (SWAT) police training" during his twelve-plus year career as a law enforcement officer, security officer, and international police trainer—Scherman's claim amounts to nothing more than rank speculation. AA412.

In sum, Scherman's argument that it was reasonable to fire the first shot at Isaiah—rather than, for example, trying his taser first—turns on a fact record that this Court cannot consider without exceeding its jurisdiction.

2. It Was Clearly Established That It Is Unlawful To Use Deadly Force To Stop Escaping Unarmed Suspects Suffering From A Mental Health Crisis.

To the extent this Court chooses to disentangle Scherman's factual challenges from his purely legal arguments and proceed rather than dismiss the appeal, the scope of review is narrow. The *only* argument this Court may entertain on appeal is whether it was clearly established that Scherman could not use deadly force "against the naked, unarmed [Isaiah]" when he fired the first shot. *See* AA505.

While "general statements of the law" surely put Scherman on notice that it would be unlawful to apply deadly force on Isaiah, this Court has both declared the law violated (so as to clearly establish it going forward) and *already* clearly established in cases with striking similarities to this one. The district court concluded that at least two cases "provide[d] Scherman with fair warning that his conduct could violate [Isaiah]'s constitutional rights." AA507.

Start with *Estate of Ceballos v. Husk*, 919 F.3d 1204 (10th Cir. 2019). *See* AA506. "Ceballos's wife called 911" and reported that her husband was in the "driveway of their home with two baseball bats" and "acting crazy." *Ceballos*, 919 F.3d at 1209 (cleaned up). She further reported that Ceballos "was drunk and probably on drugs," that she felt "afraid," and that her 17-month old daughter was with her. *Id*. In response to a "high priority" dispatch, four police officers sped to the Ceballos home. *Id*. En route, the officers learned that Ceballos "is known to have

knives," had previously "threatened his wife with a knife," and had stopped taking medication prescribed to him to treat his mental illness. *Id*. Upon arriving, officers found Ceballos "pacing in the driveway," where he was "swinging a baseball bat, yelling, and throwing his arms in the air." *Id*. at 1210. Officers "repeatedly shouted commands for Ceballos to drop the bat." *Id*. Instead, Ceballos went into his garage before emerging with "the bat in his hand" and "walking toward the officers," who, by that time, had their weapons drawn and "continued shouting commands" to drop the bat. *Id*. Instead of complying, Ceballos responded with, "Or what, Motherfucker?" *Id*. Husk responded with, "Or you will be shot," and additional commands to "stop and drop the bat." When Ceballos refused and continued moving toward the officers at a disputed pace, baseball bat in hand, Husk shot and killed him. *Id*. On these facts, the Tenth Circuit affirmed the district court's denial of qualified immunity, explaining that "the legal right at issue is clear—that an officer violates the Fourth Amendment" when they "rely on lethal force unreasonably as a first resort in confronting an irrational suspect who is armed only with a weapon of short-range lethality." *Id.* at 1219.

Next consider *Allen v. Muskogee, Okl.*, 119 F.3d 837 (10th Cir. 1997). *See* AA507. "[A]fter an altercation with his wife and children," Allen "took ammunition and several guns with him" and parked in his sister's driveway. *Allen*, 119 F.3d at 839. En route to the scene, officers learned via radio dispatch that Allen was armed,

had threatened his family, was suicidal, and was subject to an outstanding warrant. *Id*. They may have also learned that Allen "had claimed to have killed three people before arriving at his sister's home." *Id*. at 840. Upon arriving on scene, officers discovered that "bystanders" had amassed "near Mr. Allen's vehicle," where Mr. Allen was "sitting in the driver's seat" of his car "with one foot out of the vehicle[,]" and "a gun in his right hand, which was resting on the console between the seats." *Id*. Officers ordered Allen to drop the gun and then "reached into the vehicle and attempted" to wrest Allen's gun from him. *Id*. When Allen resisted and aimed the gun at different officers in rapid succession, "shots were exchanged." *Id*. Officers fired a total of twelve rounds, striking Allen four times. *Id*. He died on the scene "approximately ninety seconds" after the officers first arrived. *Id*. On these facts, this Court reversed the district court's grant of summary judgment in favor of the officers, holding that a reasonable jury could find that the officers violated the Fourth Amendment's prohibition on excessive force.[19] *Id*. at 841.

[19] Scherman argues that *Allen* is a case that is about where officers recklessly provoked a confrontation that led to the use of deadly force and is therefore irrelevant to the question of whether Scherman violated clearly established law. But this Court has not read *Allen* in such a narrow fashion. *See Ceballos*, 919 F.3d at 1215-16 ("*Allen* held that [] a jury could find that the officers used"—not just provoked, as Scherman argues—"excessive force under the circumstances presented in that case."). Scherman's argument that *Ceballos* is also a provocation case misses the mark for a similar reason. The *Ceballos* court held that the officer's conduct was proscribed by two separate and independent clearly established rules: "an officer violates the Fourth Amendment when his or her reckless or deliberate conduct results

Scherman attempts to identify several purported distinctions between *Allen*, *Ceballos*, and this matter. None hold up.

To start, Scherman argues the "fact that most clearly distinguishes" *Ceballos* and *Allen* from this matter is that whereas "Ceballos became violent only after police forced him to retreat into his own garage" and "*Allen* involves a similar fact pattern," Isaiah "became aggressive toward officers long before he encountered Sergeant Box and Officer Scherman." Appellant's Br. 16 & n.7. He is incorrect. Prior to the officers' arrival, Ceballos was wielding baseball bats, "acting crazy," and causing his wife to fear him—a rational fear considering that he had previously "threatened his wife with a knife" and was "known to have knives." Allen, for his part, was intercepted by police immediately after threatening his family, fleeing with "ammunition and several guns," and claiming to have killed three people. *Allen*, 119 F.3d at 839-40. By contrast, "it is undisputed" that Isaiah had walked around naked for an hour without any violence, threats of violence, or confrontations before Box and Scherman spotted him and chased him into the home where he was fatally shot. AA502.

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in the need for lethal force *or* when the officers rely on lethal force unreasonably as a first resort." 919 F.3d at 1219 (emphasis added). The latter holding—that "rely[ing] on lethal force unreasonably as a first resort" violates a clearly established constitutional right—has nothing to do with provocation.

Scherman's argument that Isaiah "feloniously assaulted Sergeant Box," rendering him "unconscious," as "Officer Scherman watched," Appellant's Br. 16, does not amount to a meaningful distinction either. As an initial matter, the facts at this stage are that Isaiah did not knock Box out or even down. AA435; AA492-93. Even if he had, that would be a far cry from the conduct preceding the fatal encounters in *Allen* and *Ceballos*. In the former, Allen attempted to shoot multiple officers—and may even have gotten off several rounds—before officers shot him. 119 F.3d at 840. In the latter, Ceballos was wielding a bat or two and maybe a knife as he lurched toward the officer at a speed between a walk and a run. 919 F.3d at 1210. Isaiah, by contrast, approached Scherman, naked and unarmed, and was shot once, stopping him in his tracks. Yet although Isaiah no longer moved towards him, Scherman kept firing.

Ultimately, that Scherman's best attempts at distinguishing *Ceballos* and *Allen* depends upon jurisdiction-stripping mischaracterizations of the facts in this case is telling. As the district court recognized, those cases clearly established the unlawfulness of Scherman's conduct when the facts are taken as the district court found them. In fact, taking the facts in the light most favorable to Isaiah and as the district court found them, the first shot in this case was even *less* reasonable than the shootings in *Allen* and *Ceballos.* The officers in *Allen* encountered a suspect who was armed with *at least* one gun and maybe "several." *See Allen*, 119 F.3d at 840.

The officers in *Ceballos* encountered a suspect who was armed with *at least* a baseball bat, maybe two bats, and possibly also knives (not to mention what else he gathered in the garage). *See Ceballos*, 919 F.3d at 1209. Scherman, by contrast, encountered a suspect he knew to be wholly unarmed. AA322. Because "[t]he other salient facts" in this case "only operate to make [Scherman's] conduct even less reasonable" than the conduct of the officers in *Allen* and *Ceballos*, those are not only "factually relevant precedent that put [Scherman] on notice of the unconstitutionality of his behavior," they are "*a fortiori* or super precedent" because they held conduct more reasonable than Scherman's to be unconstitutional. *McCowan v. Morales*, 945 F.3d 1276, 1286 (10th Cir. 2019).

And the district court's conclusion is bolstered by myriad additional Tenth Circuit cases clearly establishing that officers cannot use deadly force against unarmed suspects suffering from mental illness. This Court has applied that rule in circumstances where officers faced a far greater threat than Scherman faced from Isaiah. Consider just four:

- In *Carr v. Castle*, an "emotionally disturbed person" had punched his landlord several times; struck one officer on the head; kicked another in the groin; instigated a high-speed foot chase; resisted several different types of less-lethal force; and was running at officers with a four-inch piece of concrete, while raising his arm to throw it at them, when he was shot dead. 337 F.3d 1221, 1224-25, 1230 (10th Cir. 2003). This Court nonetheless held that the officers violated clearly established law prohibiting the use of deadly force. *Id*. at 1226-28.

- In *Zia Trust Co. ex rel. Causey v. Montoya*, a 911 call reported a domestic dispute involving "mental health issues" and cautioned that the victim had access to two firearms. 597 F.3d 1150, 1153 (10th Cir. 2010). When police officers arrived, they found the mentally ill adult in the driver's seat of a van; a child was in the passenger seat. *Id*. When the van suddenly lurched toward an officer standing less than fifteen feet away, he fired, killing the driver. *Id*. This Court denied qualified immunity. *Id*. 1155.
- In *King v. Hill*, 911 reported a "domestic disturbance," explaining that the victim "was making threats" against his wife, damaging property, and was "off his meds." 615 F. App'x 470, 471 (10th Cir. 2015). Responding officers feared the victim was hiding a "long gun" under a bulky jacket. *Id*. And the victim threatened to use "explosives to blow this place up"—referring to the house—to "blow you-all's assess up"—referring to the officers—and then, adding immediacy to the threats, said "that's it, mother fuckers." *Id*. at 472. When the victim then moved toward an officer, police fired their weapons. *Id*. Relying on *Zia Trust*, *Walker v. City of Orem*, 451 F.3d 1139 (10th Cir. 2006), and *Garner*, this Court denied qualified immunity. *Id*. at 477-79.
- In *Zuchel v. Spinharney*, a "disturbed and disoriented" transient caused a "disturbance" when he attacked the front door of a McDonald's restaurant, shattering its glass. 890 F.2d 273, 274-75 (10th Cir. 1989). The victim then got into a "heated exchange" with four teenagers, threatening to kill one of them. *Id*. Police on the scene were warned that the victim had a knife. *Id*. at 274. When the victim rushed toward the officer and ignored commands to drop his knife, the officer fired four shots. *Id*. This Court denied qualified immunity. *Id*. at 276.

These cases are on all fours with this one, providing Scherman with ample notice that it was unlawful to fire his weapon at Isaiah. Like the "emotionally disturbed person" in *Carr;* the adult son with "mental health issues" in *Zia;* the family member "off his meds" in *King;* and the "disturbed and disoriented" person in *Zuchel*, Isaiah was experiencing a mental health crisis on the day he was killed. Like the officer responding to the landlord-tenant dispute and accompanying "assault" in *Carr;* the officer responding to domestic dispute,

accompanied by the threat of "firearms" in *Zia;* the officer responding to the marital dispute, accompanied by "threats" and property damage in *King;* and the officer responding to the "disturbance," property destruction, and "heated exchange" in *Zuchel*, Scherman knew that Isaiah was unwell and had been involved in a domestic dispute prior to making contact with him.

There is one meaningful difference, of course. Unlike the officer in *Carr*, who was attacked with a block of concrete as the suspect "ran toward" him; the officer in *Zia* who faced a van that "jumped forward at him"; the officer in *King,* who was in a showdown with someone suspected of being armed with a "long gun," who threatened to "blow you-all's asses up" with explosives, and possibly said "that's it, motherfuckers" before stepping toward him; or the officer in *Zuchel,* who believed he was contending with an "approach[ing]" or "charg[ing]" knife-wielding suspect, Isaiah was never suspected of being armed when Scherman shot him. As a result, this "super precedent" was double notice to Scherman that it was unlawful to shoot Isaiah, an unarmed suspect suffering from mental illness, who did not pose a threat justifying deadly force. *See McCowan*, 945 F.3d at 1286.

CONCLUSION

For the aforementioned reasons, this Court should dismiss the appeal on jurisdictional grounds. In the alternative, it should affirm the district court's denial of qualified immunity to Scherman.

Respectfully submitted,

Dated: December 21, 2021

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STATEMENT CONCERNING ORAL ARGUMENT

Plaintiffs respectfully suggest that oral argument is unnecessary because this appeal calls for a straightforward application of longstanding jurisprudence to the district court's factual conclusions regarding what a reasonable jury could find.

CERTIFICATES OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(g)(1) because it contains 11,739 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: December 21, 2021

/s/ Daniel M. Greenfield
Daniel M. Greenfield

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's guidelines on the use of the CM/ECF system, I hereby certify that:

a. all required privacy redactions have been made;

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Dated: December 21, 2021

/s/ Daniel M. Greenfield
Daniel M. Greenfield

CERTIFICATE OF SERVICE

I certify that on December 21, 2021, I filed a true, correct, and complete copy of the foregoing Appellees' Brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF System.

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